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BEFORE THE ARIZONA CORPORATION COMMISSION

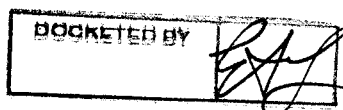
BOB STUMP, Chairman
 GARY PIERCE
 BRENDA BURNS
 BOB BURNS
 SUSAN BITTER SMITH

Arizona Corporation Commission

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COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION
 OF ARIZONA WATER COMPANY TO
 EXTEND ITS CERTIFICATE OF
 CONVENIENCE AND NECESSITY IN
 CASA GRANDE, PINAL COUNTY,
 ARIZONA

ORIGINAL

Docket No. W-01445A-03-0559

ARIZONA WATER COMPANY'S
 SUPPLEMENTAL REPLY TO
 CORNMAN TWEEDY'S
 RESPONSE TO MOTION TO
 STRIKE REBUTTAL TESTIMONY
 OF ERNEST G. JOHNSON

Pursuant to Administrative Law Judge Dwight D. Nodes' Procedural Order dated August 22, 2014, Arizona Water Company files this supplemental reply to the response brief filed by Cornman Tweedy 560, LLC ("Cornman Tweedy"). This supplemental reply is limited to addressing the issues of whether A.R.S. § 38-504 applies to this proceeding and whether Mr. Walker should be precluded from testifying in the present proceeding.

A. A.R.S. § 38-504 Does Not Govern This Situation and Does Not Supersede the Commission's Rule.

A.R.S. § 38-504 has no bearing on the instant situation or the applicability of A.A.C. R14-3-104(G) to Mr. Johnson's proposed testimony. Under Arizona law, "[w]hen the language of a statute is clear and unambiguous, a court should not look beyond the language, but rather 'simply apply it without using other means of construction,' assuming that the legislature has said what it means." Cundiff v. State Farm Mut. Auto. Ins. Co., 217 Ariz. 358, 360, 174 P.3d 270, 272 (2008) (citation and quotation omitted); see also State v. Jones, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997) (assuming that "the legislature accords words their natural and obvious meanings unless otherwise stated"). Additionally,

1 procedural rules and regulations “and statutes are read in conjunction with each other and
2 harmonized whenever possible.” Groat v. Equity Amer. Ins. Co., 180 Ariz. 342, 347,
3 884 P.2d 228, 233 (App. 1994); see also State v. Gatewood, 10 Ariz. App. 274, 276,
4 458 P.2d 368, 370 (1969) (recognizing that local ordinance may parallel or go beyond terms
5 of statute so long as it does not contradict statute). As a result, “[c]ourts should generally
6 avoid interpretations of [administrative] rules that make them invalid.” Kimble v. City of
7 Page, 199 Ariz. 562, 565, 20 P.3d 605, 608 (App. 2001).

8 A.R.S. § 38-504 is expressly limited to situations in which a former public officer or
9 employee “represent[s] another person for compensation before a public agency” within
10 twelve months of leaving public service (emphasis added). In this respect it tracks Arizona
11 Rule of Professional Conduct 1.11, “Special Conflicts of Interest for Former and Current
12 Government Officers and Employees.” A.R.S. § 38-504 prevents former public employees
13 from using their former positions to obtain clients and further the clients’ interests by
14 representing them before the same agency the employee had worked for. See Op. Attny.
15 Gen. No. 188-049 (relying on interpretation of ER 1.11 in analysis of A.R.S. § 38-504); ER
16 1.11, cmt. 1 (“This Rule prevents a lawyer from exploiting public office for the advantage of
17 a private client”). In that regard, A.R.S. § 38-504 is consistent with the other conflict of
18 interest statutes, A.R.S. §§ 38-501 through 510, that are intended to limit the influence
19 personal considerations may have on public officers and employees. See Yetman v.
20 Naumann, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972) (“The object of conflict of
21 interest statutes is to remove or limit the possibility of personal influence which might bear
22 upon an official's decision”).

23 A.A.C. R14-3-104(G), on the other hand, addresses a completely different situation
24 and is unique to Commission practice: it prohibits a former employee of the Commission
25 from appearing “as a witness on behalf of other parties in a formal proceeding” in which the
26 former Commission employee previously “took an active part....” A.A.C. R14-3-
27 104(G)(emphasis added). The statute addresses representation as an attorney; the rule
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addresses appearing as a witness. The statute operates for one year; the rule has no time limit. Because the subject rule addresses issues that are distinct from those addressed by the statute, the superseding provision found in A.R.S. § 38-501 does not apply to A.A.C. R14-3-104(G), a validly enacted Commission rule. A.R.S. § 38-501(B) also provides that the statutory conflict of interest statutes only supersedes the provisions of any other “law, charter provision or ordinance.” Additionally, A.R.S. § 38-501(B) has no applicability to the rules enacted by the Commission to govern the proceedings before it, as a specific administrative rule is not a “law,” “charter provision” or an “ordinance.” The Arizona Constitution grants authority to the Commission to make its own procedural rules, and A.A.C. R14-3-104(G) is exactly such a rule. Arizona Constitution Art. XV, sec. 6; see also Cundiff, 217 Ariz. at 360, 174 P.3d at 272; see also State v. Roscoe, 185 Ariz. 68, 71, 912 P.2d 1297, 1301 (1996) (“A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed”).

Cornman Tweedy’s own brief confirms that A.R.S. § 38-504 does not apply to this proceeding. Cornman Tweedy repeatedly alleges that Mr. Johnson is not representing Cornman Tweedy, but only acting as an expert witness. Specifically, Cornman Tweedy states:

Mr. Johnson has not been retained to act as legal counsel to Cornman Tweedy in this case and there is no evidence to the contrary. Cornman Tweedy is represented by legal counsel undersigned...

[Response to Arizona Water Company’s Motion to Strike the Pre-Filed Testimony of Ernest G. Johnson (8/15/2014) at 7.]

Cornman Tweedy further admits:

Mr. Johnson is not acting in the capacity of an attorney for Cornman Tweedy but as a policy witness. Thus, he is not “representing a private client” within the meaning of ER 1.11(a).

[Id. at 8.]

1 By Cornman Tweedy's own admission, Mr. Johnson is not "representing" Cornman
2 Tweedy, which renders A.R.S. § 38-504 inapplicable. In contrast, A.A.C. R14-3-104(G),
3 which specifically regulates former employees' appearances as witnesses before the
4 Commission, is directly applicable to Mr. Johnson and Mr. Johnson's proposed testimony
5 violates that rule.

6 **B. Mr. Walker's Testimony Does Not Violate The Subject Rule.**

7 Unlike Mr. Johnson, who as Director first of the Utilities Division and then the
8 Executive Director of the Commission itself, took an active part in Staff's investigation and
9 preparation of this matter, Mr. Walker acted as a policy advisor to a former Commissioner.
10 In that role, Mr. Walker had no day-to-day role in Commission investigations or case
11 preparation. [See attached Declaration of Paul Walker (8/27/2014), ¶¶ 5-9.] As noted in
12 Mr. Walker's Declaration, Mr. Walker did not participate in Staff's investigation of Arizona
13 Water Company's initial application. [Id., ¶ 8.] Nor did he participate in Staff's
14 preparations related to this matter. In fact, Mr. Walker left the Commission shortly after the
15 Commission's initial decision in this matter (which was then a routine CC&N extension)
16 and nearly a year before Cornman Tweedy started to assert the "null and void" language and
17 this matter became contested. [Id., ¶ 9.]

18 Cornman Tweedy has the burden of disqualifying Mr. Walker. Beyond a vague
19 reference to Mr. Walker's employment by the Commission a year before the issues now in
20 contention even arose, Cornman Tweedy has not presented any evidence demonstrating that
21 Mr. Walker violated the rule. To the contrary, the only evidence in the record is that Mr.
22 Walker did not "actively participate" in any investigation or preparation related to this
23 matter while working as a policy advisor for the Commission. As a result, Mr. Walker's
24 testimony is permissible under A.A.C. R14-3-104(G).

25 **CONCLUSION**

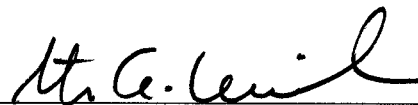
26 A.A.C. R14-3-104(G) governs the present motion, which involves participation as a
27 witness as opposed to representation by a former employee. Because Mr. Johnson, unlike
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1 Mr. Walker, took an active part in the investigation and preparation of this matter after it
2 became contested and while he was the Director of the Utilities Division and the
3 Commission's Executive Director, his pre-filed rebuttal testimony should be stricken and his
4 testimony at the hearing precluded.

5 RESPECTFULLY SUBMITTED this 27th day of August, 2014.

6 BRYAN CAVE LLP

7
8
9 By



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16 27th day of August, 2014, with:

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22 this 27th day of August 2014, to:

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3 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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15 ARIZONA

Docket No. W-01445A-03-0559

16 **DECLARATION OF PAUL**
17 **WALKER**

18 Paul Walker, pursuant to Arizona Rule of Civil Procedure 80(i), declares under penalty of
19 perjury as follows:

20 1. I am over eighteen years of age and competent to make this declaration. Except as
21 indicated below, this declaration is based upon information personally known to me and if called
22 upon to do so I am willing to testify to the matters stated herein.

23 2. I make this declaration in support of Arizona Water Company's Supplemental Reply
24 To Cornman Tweedy's Response To Motion to Strike Rebuttal Testimony Of Ernest G. Johnson.

25 3. Between January, 2001 and May, 2004, I held the position of policy advisor to
26 former Commissioner Marc Spitzer.

27 4. As advisor to Commissioner Spitzer, my duties included reviewing the Arizona
28 Corporation Commission's files related to matters the Commission was going to consider at
upcoming Commission Open Meetings, including applications for extension of certificates of
convenience and necessity ("CCN") from public service corporations providing public utility water
service. I would then advise Commissioner Spitzer with respect to my review of such pending
matters.

6. From my review of the docket in this matter, I understand that Arizona Water Company applied for an extension of its CCN to include, among other property, the property commonly known as the Cornman Tweedy property in August, 2003.

7. I also understand based on that review that on March 12, 2004, the Commission's Hearing Division docketed a Recommended Opinion and Order from Administrative Law Judge Amanda Pope, which recommended that the Commission approve Arizona Water Company's August, 2003 application to extend its CCN. The Commission approved Arizona Water Company's application on April 6, 2004.


8. While I do not recall having any substantive involvement with Arizona Water Company's application in this matter, my only possible involvement would have been as a policy advisor to Commissioner Spitzer. I did not participate in any way in Staff's investigation of Arizona Water Company's application nor did I participate in any way in Staff's preparation of its file or participation in this matter.

9. I left the Commission in May, 2004, before this action became a contested matter.

9. I left the Commission in May, 2004, before this action became a contested matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27th day of August, 2014 at Phoenix, Arizona.


Paul Walker